



**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-R03-OAR-2011-0092; FRL-9651-7]**

**Approval and Promulgation of Air Quality Implementation Plans; West Virginia;  
Regional Haze State Implementation Plan**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is finalizing the limited approval and limited disapproval of West Virginia's Regional Haze State Implementation Plan (SIP) revision. EPA is taking this action because West Virginia's SIP revision, as a whole, strengthens the West Virginia SIP. We are finalizing our limited disapproval of the same SIP revision arising from the remand by the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) to EPA of the Clean Air Interstate Rule (CAIR). This action is being taken in accordance with the requirements of the Clean Air Act (CAA) and EPA's rules for states to prevent and remedy future and existing anthropogenic impairment of visibility in mandatory Class I areas through a regional haze program. EPA is also approving this revision as meeting the infrastructure requirements relating to visibility protection for the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS) and the 1997 and 2006 fine particulate matter (PM<sub>2.5</sub>) NAAQS.

**DATES:** Effective Date: This final rule is effective on [insert date 30 days from date of publication].

**ADDRESSES:** EPA has established a docket for this action under Docket ID Number **EPA-R03-OAR-2011-0092**. All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) website. Although listed in the electronic docket, some information is not publicly available, i.e., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through [www.regulations.gov](http://www.regulations.gov) or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street SE, Charleston, West Virginia 25304.

**FOR FURTHER INFORMATION CONTACT:** Melissa Linden, (215) 814-2096, or by e-mail at [linden.melissa@epa.gov](mailto:linden.melissa@epa.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

Throughout this document, whenever “we,” “us,” or “our” is used, we mean EPA. On July 13, 2011 (76 FR41158), EPA published a notice of proposed rulemaking (NPR) for the Commonwealth of West Virginia. The NPR proposed limited approval and limited disapproval of West Virginia’s Regional Haze SIP. The formal SIP revision was submitted by West Virginia Department of Environmental Protection (WVDEP) on June 18, 2008. This revision also meets the requirements of 110(a)(2)(D)(i)(II) and 110 (a)(2)(J), relating to visibility protection for the 1997 8-hour ozone NAAQS and the 1997 and 2006 PM<sub>2.5</sub> NAAQS.

## **II. Summary of SIP Revision**

The SIP revision includes a long term strategy with enforceable measures ensuring reasonable progress towards meeting the reasonable progress goals for the first planning period, through 2018. West Virginia's Regional Haze Plan contains the emission reductions needed to achieve West Virginia's share of emission reductions and sets the reasonable progress goals for other states to achieve reasonable progress at the two Class I Areas within West Virginia, Dolly Sods Wilderness Area and Otter Creek Wilderness Area. The specific requirements of the CAA and EPA's Regional Haze Rule and the rationale for EPA's proposed action are explained in the NPR and will not be restated here. EPA received two adverse comments on the July 13, 2011 NPR. Both comments raise similar concerns with the NPR and have been combined. A summary of the comments submitted and EPA's responses are provided in section III of this document.

## **III. Summary of Public Comments and EPA Responses**

**Comment:** The commenter argues that EPA's proposed limited approval/limited disapproval action based on West Virginia's reliance on CAIR is unwarranted and should be withdrawn. Instead, the commenter states that EPA should grant full and unconditional approval of the West Virginia regional haze SIP. The commenter disagrees that CAIR renders the State's SIP unable to satisfy all of the CAA's regional haze SIP requirements. The commenter notes that West Virginia's SIP was submitted prior to the remand of CAIR and relied on the requirements under 40 CFR 51.308(e)(4), which remain in effect at this time. The commenter argues that as a result, the West Virginia SIP is entirely consistent with the applicable law. Moreover, the commenter highlights that the visibility-improvement benefits from CAIR's emission reductions are likely to

be replicated, or indeed exceeded, by the visibility benefits projected to result from the Cross State Air Pollution Rule. The commenter argues that EPA does not have a basis to propose or promulgate disapproval or limited disapproval of a Regional Haze SIP due to its reliance on CAIR and on 40 CFR 51.308(e)(4), because EPA has not determined, based on a thorough and defensible analysis, that the emission reductions and associated visibility-improvement benefits that are likely to result from the final CSAPR will not be at least comparable to those achieved under CAIR. Because the SIP is fully compliant with the relevant regulations as they exist today, and EPA, at this time, has not made a determination that CSAPR will not satisfy the CAA's Best Available Retrofit Technology (BART) alternative requirements for nitrogen oxides (NO<sub>x</sub>) and sulfur dioxide (SO<sub>2</sub>) emissions from electric generating units (EGUs) and cannot be used, in at least the same measure as CAIR was used, to help meet reasonable progress requirements for regional haze, the commenter believes that the only proper course of action for EPA is to promptly promulgate a full approval of the West Virginia SIP.

**Response:** The requirements for a BART alternative program, specific to trading programs in 40 CFR 51.308(e)(2) state that “such an emissions trading program or other alternative measure must achieve greater reasonable progress than would be achieved through the installation and operation of BART.” EPA’s analysis, in 2005, showing that CAIR would provide for greater reasonable progress than BART, was based on then reasonable assumption that CAIR met the requirements of the CAA and would remain in place. EPA’s Transport Rule, commonly referred to as the Cross State Air Pollution Rule, sunsets the requirements of CAIR. EPA’s decision to sunset CAIR is the result of a decision by the D.C. Circuit remanding CAIR to EPA and leaving CAIR in place only “temporarily,” as noted in our notice of proposed rulemaking and by the

commenters. As such, notwithstanding the regulatory text in 40 CFR 51.308(e)(4), we cannot fully approve the West Virginia Regional Haze SIP which relies heavily on CAIR as part of its long-term strategy and to meet the BART requirements.

EPA does agree that the Transport Rule is likely to result in visibility improvements at least comparable to CAIR; however, nothing in West Virginia's Regional Haze SIP suggests that the State relied on the Transport Rule to meet its regional haze obligations. The EPA has completed an analysis and has proposed the Transport Rule as an alternative to BART for EGUs located in the Transport Rule states (which include West Virginia). 76 FR 82219. Given the significance of the emissions reductions from CAIR to West Virginia's demonstration that it has met the requirements of the Regional Haze Rule, EPA is issuing a limited disapproval of the West Virginia SIP. Although CAIR is currently being administered by EPA pursuant to an order by D.C. Circuit in *EME Homer Generation, L.P. v. EPA*, it will not remain in effect indefinitely. For this reason, EPA cannot fully approve Regional Haze SIP revisions that rely on CAIR for emission reduction measures.

#### **IV. Final Action**

EPA is finalizing its limited approval and limited disapproval of the revision to the West Virginia SIP submitted on June 18, 2008, that addresses regional haze for the first implementation period. EPA is issuing a limited approval of the West Virginia SIP since overall the SIP will be stronger and more protective of the environment with the implementation of those measures by the State and having Federal approval and enforceability than it would without those measures being included in the State's SIP.

EPA is finalizing the limited disapproval of those portions of West Virginia's SIP that rely on CAIR. This final limited disapproval does not affect the Federal enforceability of the measures in the West Virginia SIP revision nor prevent state implementation of these measures. The final limited disapproval provides EPA the authority to issue a Federal Implementation Plan (FIP) at any time, and obligates EPA to take such action no more than two years after the effective date of the final limited disapproval action. EPA has proposed a partial regional haze FIP that would provide that the BART requirements for SO<sub>2</sub> and NO<sub>x</sub> emissions from EGUs in West Virginia are satisfied by the already-promulgated Transport Rule FIP applicable to EGU sources in West Virginia, as would be allowed by a proposed revision to the Regional Haze Rule that was included in the same notice published on December 30, 2011. 76 FR 82219. EPA is also approving this revision as meeting the applicable visibility related requirements of the CAA section 110(a)(2) including, but not limited to 110(a)(2)(D)(i)(II) and 110(a)(2)(J), relating to visibility protection for the 1997 8-hour ozone NAAQS and the 1997 and 2006 PM<sub>2.5</sub> NAAQS.

## **V. Statutory and Executive Order Reviews**

### **A. Executive Order 12866, Regulatory Planning and Review**

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled "Regulatory Planning and Review."

### **B. Paperwork Reduction Act**

Under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., OMB must approve all "collections of information" by EPA. The Act defines "collection of information" as a requirement for answers to \* \* \* identical reporting or recordkeeping requirements imposed on ten or more

persons \* \* \*. 44 U.S.C. 3502(3)(A). The Paperwork Reduction Act does not apply to this action.

### **C. Regulatory Flexibility Act (RFA)**

The RFA generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

This rule will not have a significant impact on a substantial number of small entities because SIP approvals under section 110 and subchapter I, part D of the CAA do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Moreover, due to the nature of the Federal-state relationship under the CAA, preparation of a flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The CAA forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co., v. EPA*, 427 U.S. 246, 255-66 (1976); 42 U.S.C. 7410(a)(2).

### **D. Unfunded Mandates Reform Act**

Under sections 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in

estimated costs to State, local, or tribal governments in the aggregate, or to the private sector, of \$100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that today's proposal does not include a Federal mandate that may result in estimated costs of \$100 million or more to either state, local, or tribal governments in the aggregate, or to the private sector. This Federal action proposes to approve pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

#### **E. Executive Order 13132, Federalism**

Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications.” “Policies that have Federalism implications” is defined in the Executive Order to include regulations that have “substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.” Under Executive Order 13132, EPA may not issue a regulation that has Federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government



provides the funds necessary to pay the direct compliance costs incurred by state and local governments, or EPA consults with state and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has Federalism implications and that preempts state law unless the Agency consults with state and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the CAA. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

#### **F. Executive Order 13175, Coordination with Indian Tribal Governments**

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” This rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

### **G. Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks**

*Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be “economically significant” as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. This action is not subject to Executive Order 13045 because it is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997).

### **H. Executive Order 13211, Actions that Significantly Affect Energy Supply, Distribution, or Use**

This rule is not subject to Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

### **I. National Technology Transfer and Advancement Act (NTTAA)**

Section 12 of the NTTAA of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use “voluntary consensus standards” (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise

impractical. EPA believes that VCS are inapplicable to this action. Today's limited approval and limited disapproval does not require the public to perform activities conducive to the use of VCS.

#### **J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations**

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA lacks the discretionary authority to address environmental justice in this Virginia Regional Haze proposed action. In reviewing SIP submissions, EPA's role is to approve or disapprove state choices, based on the criteria of the Clean Air Act. Accordingly, it does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898.

#### **K. Submission to Congress and the Comptroller General**

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the

agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

#### **L. Petitions for Judicial Review**

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [Insert date 60 days from date of publication of this document in the Federal Register]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This limited approval and limited disapproval of the West Virginia Regional Haze SIP may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

#### **List of Subjects in 40 CFR part 52**

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

March 15, 2012  
Dated:

James W. Newsom, Acting  
Regional Administrator,  
Region III.

40 CFR Part 52 is amended as follows:

PART 52 - [AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart XX--West Virginia

2. In § 52.2520, the table in paragraph (e) is amended by adding an entry for Regional Haze Plan at the end of the table to read as follows:

§ 52.2520                      Identification of plan.

\*       \*       \*       \*       \*

(e)\* \* \*

<b>Name of non-regulatory SIP revision</b>	<b>Applicable geographic area</b>	<b>State submittal date</b>	<b>EPA approval date</b>	<b>Additional explanation</b>
*   *   *   *   *	*   *			
Regional Haze Plan	Statewide	6/18/08	<u>[Insert Federal Register publication date]</u> <u>[Insert page number where the document begins]</u>	§52.2533(d); Limited Approval

3. Section 52.2533 is amended by adding paragraph (d) to read as follows:

§ 52.2533                      Visibility protection.

\*       \*       \*       \*       \*

(d) Limited approval of the Regional Haze Plan submitted by West Virginia on June 18, 2008; limited disapproval for those sections relying upon emission reductions from the Clean Air Interstate Rule (CAIR).

[FR Doc. 2012-7027 Filed 03/22/2012 at 8:45 am; Publication Date: 03/23/2012]